

territory by conquest, by treaty, or by discovery, and occupation, is not disputed, nor is the proposition that in all international relations, interests, and responsibilities, the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.

COMMENTS ON JUSTICE WHITE'S OPINION.

"In the concurring opinion of Mr. Justice White, we find certain important propositions conceded, some of which are denied, or not admitted in the other on the De Lima case. These are to the effect that 'when an act of any department is challenged, because not warranted by the constitution, the existence of the authority is to be ascertained by determining whether the power has been conferred by the constitution, either in express terms or by lawful implication;' that as every function of the government is derived from the constitution, 'that instrument is everywhere and at all times potential in so far as its provisions are applicable;' that 'wherever a power is given by the constitution and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits;' that where conditions are brought to which any particular provision of the constitution applies, its controlling influence cannot be frustrated by the action of any or all of the departments of the government; that the constitution has conferred on congress the right to create such municipal organizations as it may deem best for all the territories of the United States, but every applicable express limitation of the constitution is in force, and even where there is no express command which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed though not expressed in so many words; that every provision of the constitution which is applicable to the territories is controlling therein, and all the limitations of the constitution applicable to congress in governing the territories necessarily limit its power; that in the case of the territories, when a provision of the constitution is invoked, the question is whether the provision relied on is applicable; and that the power to lay and collect taxes, duties, imposts, and excises, as well as the qualification of uniformity, restrains congress from imposing an impost duty on goods coming into the United States from a territory which has been incorporated into and forms a part of the United States.

INQUIRY NECESSARY IN EACH CASE.

"And it is said that the determination of whether a particular provision is applicable involves an inquiry into the situation of the territory and its relations to the United States, although it does not follow, when the constitution has withheld all power over a given subject, that such an inquiry is necessary.

"The inquiry is stated to be: 'Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?' And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

"But I submit that that is not the question in this case. The question is whether, when congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, congress can in the same act and in the exercise of the power conferred by the first clause of section 8, impose duties on the commerce between Porto Rico and the states and other territories in contravention of the rule of uniformity qualifying the power. If this can be done, it is because the power of congress over all the territories is not restricted by the constitution. This was the position taken by the attorney general, with a candor and ability that did him great credit.

"But that position is rejected, and the contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of congress, irrespective of constitutional provisions.

THE UNRESTRICTED POWER OF CONGRESS.

"The accuracy of this view is supposed to be sustained by the act of 1856, in relation to the protection of citizens of the United States removing guano from unoccupied islands; but I am unable to see why the discharge by the United States of its undoubted duty to protect its citizens on terra

nullius, whether temporarily engaged in catching and curing fish, or working mines, or taking away manure, furnishes support to the proposition that the power of congress over the territories of the United States is unrestricted.

"Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of section 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power, an intimation to which I do not assent, the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

"The concurring opinion recognizes the fact that congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guarantees of life, liberty, and property, but assumes that congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

MAY PROHIBIT COMMERCE ENTIRELY.

"The logical result is that congress may prohibit commerce altogether between the states and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

"That theory assumes that the constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power.

"In our judgment, so much of the Porto Rican act as authorized the imposition of these duties is invalid, and plaintiffs were entitled to recover.

"Some argument was made as to general consequences apprehended to flow from this result, but the language of the constitution is too plain and unambiguous to permit its meaning to be thus influenced. There is nothing 'in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution' in giving it a construction not warranted by its words.

"Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. But that furnishes no basis for judicial judgment, and if the producers of tobacco, or sugar, or rice, in the existing states of this union, believe the constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished. The people of all the states are entitled to a voice in the settlement of that subject.

"Again, it is objected on behalf of the government that the possession of absolute power is essential to the acquisition of vast and distant territories, and that we should regard the situation as it is today rather than as it was a century ago. 'We must look at the situation as comprehending a possibility—I do not say a probability, but a possibility—that the question might be as to the powers of this government in the acquisition of Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese empire.'

FRAMED FOR ALL AGES.

"But it must be remembered that, as Marshall and Story declared, the constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close of the convention, they well knew, was that star of empire, whose course Berkeley had sung sixty years before.

"They may not indeed have deliberately considered a triumphal progress of the nation, as such, around the earth, but, as Marshall wrote: 'It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.'

"This cannot be said, and, on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the

limitations on the exertion of arbitrary power would have been made more vigorous.

"After all, these arguments are merely political, and 'political reasons have not the requisite certainty to afford rules of judicial interpretation.'

POWER TO EXECUTE ALL LAWS.

"Congress has power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. If the end be legitimate and within the scope of the constitution, then, to accomplish it, congress may use 'all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution.'

"The grave duty of determining whether an act of congress does or does not comply with these requirements is only to be discharged by applying the well-settled rules which govern the interpretation of fundamental law, unaffected by the theoretical opinions of individuals.

"Tested by those rules, our conviction is that the imposition of these duties cannot be sustained."

Justice Harlan's Opinion.

Justice Harlan submitted a separate opinion called forth, he said, "by certain passages in one of the opinions just delivered in support of the judgment." He said:

"Although the states are constituent parts of the United States, the government rests upon the authority of the people of the United States, and not on that of the states. Chief Justice Marshall, delivering the unanimous judgment of this court in *Cohens vs. Virginia*, said: 'That the United States form for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In many other respects the American people are one; and the government which is alone capable of controlling and managing their interests is the government of the union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.'

CONSTITUTION FOR THE TERRITORIES.

"In view of these utterances by this court, I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government by the states in union, and that the prohibitions and limitations of the constitution are addressed only to the states. That is but another form of saying that the government is a mere league of states, held together by compact between themselves; whereas, as this court has often declared, it is a government created by the people of the United States, with enumerated powers, and supreme with respect to certain objects throughout all the territory over which its jurisdiction extends. The constitution by which that government was created speaks not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority and jurisdiction of the United States.

"In the opinion to which I am referring it is also said that 'practical interpretation put by congress upon the constitution has been long continued and uniform to the effect that the constitution is applicable to territories acquired by purchase or conquest only when and so far as congress shall direct;' that while all power of government may be abused, the same may be said of the power of the government 'under the constitution as well as outside of it;' that 'if it once be conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;' that 'the liberality of congress in legislating the constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the constitution itself, and little in the interpretation put upon it, to confirm that impression;' that as the states could only delegate to congress such powers as they themselves possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that 'if congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;' that 'if we assume that the territorial